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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT, *Petitioners,*

—vs—

STATE OF FLORIDA, *Respondent.*

BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

All references to the Appendix will be made by the use of the prefix "A" and the page number in the appendix and the page number of the original transcript of testimony immediately following.

STATEMENT OF THE CASE

The Petitioners were tried and convicted in the Criminal Court of Record, in and for Orange County, Florida. At the trial, the following testimony was adduced.

The Police Officers of the Orange County Sheriff's Department in the City of Orlando, Florida, arranged to use a house

at 221 Manor Road, (A 39-42; 697, 698 and 699) adjacent to the house of the Petitioner, Clyde Lee, who resided at 411 Manor Road. Thereafter Police arranged with the telephone company to install a telephone there on the party line of the Petitioner, Clyde Lee, (A 26-29; 578 & 589). The Police paid for this installation. (A 1-2; 319).

The purpose for this installation is conceded by Detective Bobby Tanner of the Orange County Sheriff's Department to eavesdrop, or to search for evidence. (A 2-4; 323 & 324) Officer Francis Merrick testified that after the phone was installed at the house on 221 Manor Road, he placed a tape recorder and automatic actuator on the telephone by loosening two screws on the wall outlet and attaching the wires thereto. To this apparatus, earphones were attached that enabled them to eavesdrop or to overhear the conversation of the petitioners (A 29-33; 600, 605) without the necessity of having to lift the receiver. (A 37-38; 660) No one informed Petitioners, Lee, Brecheen or Merritt of the eavesdropping by the Police. (A 36, 37; 654).

Officer Merrick also testified that no permission was received from the sender to intercept their telephone conversations (A 38, 39; 664, 665), nor was any search warrant ever applied for by the police to conduct this electronic surveillance. Each time petitioner, Lee, made a telephone call, the conversations were taped and subsequently played audibly before the jury and admitted into evidence. Each time the Petitioner, Brecheen made an incoming call to Lee, the conversations were recorded and the tapes admitted into evidence. (A 44 & 45; 1050 & 1051) The same holds true for the Petitioner, Merritt, each time he made an incoming call. (A 42-44; 756, 757).

The incriminating evidence of these conversations was explained by the testimony of Lieutenant James Goode by virtue

of certain hypothetical questions propounded to him by the Solicitor. (A 45-63; 1535-1544) Tapes of these conversations were subsequently admitted into evidence, after they had been played audibly for the jury. (A 53, 54; 1589, 1590) Timely objections were made to the introduction of this evidence throughout the trial (A 33-36; 639) and (A 54-55; 1591).

Other tapes of other conversations either outgoing from Lee to Brecheen or Merritt, or incoming from the latter two to Lee's phone, that occurred 4 or 5 days prior to the search on August 10, 1963, were played audibly before the jury and admitted into evidence, but these were not included in the appendix since their only value is cumulative. These other tapes were played before the jury each time Officer Merrick or Officer Horner testified. With these conversations as a basis, the police obtained a search warrant (A 55-62) and executed it on August 10, 1963, at 411 Manor Road. (A 1; 279).

QUESTIONS PRESENTED

Point I

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE INTERCEPTED BY THE POLICE ON THE SAME PARTY LINE WITHOUT THE KNOWLEDGE OR CONSENT OF THE SENDER IS ADMISSIBLE IN A STATE COURT ON THE AUTHORITY OF 47 U.S.C., SECTION 605, OF THE FEDERAL COMMUNICATIONS ACT.

Point II

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE CONSTI-

TUTES AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ARGUMENT

Point I

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE INTERCEPTED BY THE POLICE ON THE SAME PARTY LINE WITHOUT THE KNOWLEDGE OR CONSENT OF THE SENDER IS ADMISSIBLE IN A STATE COURT ON THE AUTHORITY OF 47 U.S.C., SECTION 605, OF THE FEDERAL COMMUNICATIONS ACT.

It is abundantly clear from the Transcript of Testimony as set forth in the above statement of the case that no one informed the Petitioners of the electronic surveillance of the Petitioners through the party line outlet of the home occupied by the police at 221 Manor Road; and no permission was received by any of the police officers to intercept the petitioners' telephone conversations.

In view of the recent decisions of this Court, the real question raised by the issue is whether or not this Court should overrule *Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232.*

The scope of the Federal Communications Act is fully set forth in this Court's decision in *Benanti v. United States,* 355 U.S. 96, 2 L. ed. 2d, 126, 78 S. Ct. 155 (1957), wherein Chief Justice Warren stated:

"The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under §605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. (citing *Weiss v. United States*, 308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269). The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in *Weiss*, the interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in §605 in such a vulnerable position."

After considering other grants of authority delegated to the state under Title 47 U.S.C., the Court went on to say:

"Moreover, the very existence of these grants of authority to the States underscores the conclusion that *had Congress intended to allow the States to make exceptions to §605 it would have said so* (Emphasis supplied). In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying §605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

The basic premises of the Petitioners' argument with respect to both questions presented is that the police were mere intruders when they arranged with the telephone company to set up the party line on the same party line as the Petitioner, Lee. This is the important distinction in the case sub judice and the

case of *Rathbun v. United States*, 355 U.S. 107, 2 L. ed. 2n 134, 78 S. Ct., 161.

In the *Rathbun* case the police, with the consent of the person threatened, listened to their telephone conversation over a telephone extension. The Court held there that the contents of a communication over heard on a regularly used telephone extension, with the consent of one party to the conversation, are admissable in Federal Court and not violative of §605 of the Federal Communications Act. Inasmuch as the police must be considered under these facts as nothing more than intruders, it is clear from the above statement of the case that the police attached their apparatus for no other purpose than to intercept telephone conversations.

In the recent case of *United States v. Paska*, 332 F, 2d 193 (1964), the Seventh Circuit Court of Appeals stated:

> ". . . interception connotes a situation in which by surreptitious means a third party overhears a telephone conversation between two persons . . ."

In an earlier case Judge Learned Hand stated in *United States v. Polakoff*, 112 F, 2d 888 (2nd Cir. 1940) as follows:

> "The statute (§605, 47 U.S.C.A.) does not speak of physical interruption of the circuit, of or 'taps,' *it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts,*" (Emphasis supplied)

Another very recent case applying the same disdain for the technical niceties is *United States v. Laughlin*, 1963, 223 F. Supp. 623, which held that recordings obtained through the use

of an induction coil with the consent of one of the parties were not admissible. In a very forceful opinion, it was said:

> "To interpret the Federal Communications Act as meaning that a third party who can record a whole conversation on tape is not an *interception* does not, in my opinion, make sense for it is destructive of personal liberty. All this highly technical language to the effect that a mechanical device or an electronic device or an induction coil not directly attached to a telephone or a telephone line, but that is capable of recording a whole conversation between the parties, is not an '*interception*' is sheer nonsense. *The Courts should meet the issue squarely and should not attempt to make technical distinctions between the mechanical methods used.* What difference does it make whether a tapped wire records a conversation and an induction coil or other mechanical device does the same thing? *To say that there is a difference is a sham and an illusion,* * * * It follows therefore, that *where a conversation is recorded, regardless of the methods or the means used, without the consent of one of the parties,* the right of privacy has been violated." (Emphasis added)

It is therefore the contention of the Petitioners that if §605 represents a comprehensive scheme of interstate and intrastate regulations, then if the underlying policy of §605 cannot be thwarted by a State legislature, petitioners submit that a State rule of evidence in a State Court should be no more controlling.

Point II

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE CONSTI-

TUTES AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Upon this issue we begin with the premise that evidence obtained in violation of the Fourth Amendment of the United States Constitution is enforceable against the states through the due process clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684. As the facts above reveal, the police admitted that the only purpose for the eavesdropping was for no other reason than to search for evidence.

Deputy Tanner testified that the electronic surveillance was not conducted "for the fun of it" (A 3; 324). The basic support for the argument of the petitioners on this issue is *Katz v. United States*, 19 L. ed. 2d 576 decided by this Court some few months ago. In that case the F.B.I. agents attached an electronic listening and recording device to the outside of a public telephone booth and recorded the conversation of the petitioners which was later introduced into evidence to obtain his conviction. These facts represent a great similarity to facts of the case, sub judice. Here as in *Katz*, the police could have obtained a search warrant from a "neutral magistrate" to conduct the electronic surveillance. But here, as in *Katz*, the police more or less clothed themselves as the final arbiters of probable cause to search for evidence. This Court held in *Katz* that the "Fourth Amendment protects people not places," and the "Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve

that end did not happen to penetrate the wall of the booth can have no constitutional significance."

Mr. Justice Brennan said in his dissenting opinion in *Lopez v. United States*, 373 U.S. 427, 10 L. ed. 2d 467, 83 S. Ct. 1381:

> "The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches became intolerable intrusions into the privacy of home or office. Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional."

It can not be said that when the Petitioner, Lee ordered a private line and was given a party line, by arrangement, that he knowingly exposed himself to the intrusion of the police and the consequent eavesdropping, by the use of highly sophisticated electronic equipment. Nor, can it be said that Brechem and Merritt when they made incoming calls to the Petitioner, Lee, exposed themselves to eavesdropping for the same reasons.

As the Court said in *Katz*, ". . . What he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." The important thing here is that the police could have presented their case to a neutral magistrate and obtained a search warrant to conduct an electronic surveil-

lance, depending upon the affidavit that meets the requirements of the Fourth Amendment.

On the question of consent, this Court said in *Katz*, ". . . the very nature of electronic surveillance precludes it's use pursuant to the suspect's consent."

In the case, sub judice, we have nothing more than the indiscriminate use of electronic surveillance without the requisite antecedent judicial authorization. (See *Osborn v. United States*, 385 U.S. 323, 17 L. ed. 2d, 394, 87 S. Ct. 427, cases cited in footnote 9.)

The Court said in *Katz:*

> ". . . by passing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' citing *Beck v. Ohio*, 379 U.S. 89, 96, 13 L. ed. 2d 142, 147, 85 S. Ct. 223."

The instant case also represents another forceful similarity to the case of *Silverman v. United States*, 365 U.S. 505, 5 L. ed. 2d 734, 81 S. Ct. 679. There this Court cited with apparent approval the facts and inferences from the dissenting opinion of Judge Washington of the Court of Appeals 275 F. 2d 173, 179.

> "Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants."

In the instant case, once the police arranged with the Winter Park Telephone Company to install the party line at 221 Manor Road and render it active, this line became the "duct" to which the police attached their automatic actuator and recorder. This announced similarity of facts is significant to the extent that this Court announced in the *Katz* case that:

> "The underpinings of Olmstead and Goldman have been so erroded by our subsequent decisions that the 'trespass' doctrine there enumerated can no longer be controlling."

Therefore, the considerations (of antecedent judicial authorization) when the search here is directed at the home should not vanish. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures," *Katz*, supra.

CONCLUSION

Inasmuch as this Court held in *Schwartz v. Texas* 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, that evidence received in Court in violation of §605 is applicable only to federal courts, petitioners respectfully request this Court to overrule *Schwartz v. Texas*, and hold that evidence obtained over a party line without the knowledge or consent of the sender is inadmissible in a State Court proceedings.

On the authority of the *Katz* case, petitioners respectfully submit that the judgments of convictions must be reversed.

Respectfully submitted,

EDWARD R. KIRKLAND
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished to Hon. Wallace Allbritton, Assistant Attorney General of Florida, Capitol Square, Tallahassee, Florida, by mail this ..... day of ....., 1968.

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